

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Big Red Box LLC,)	
)	C/A No.: 3:18-758-JMC-SVH
Plaintiff,)	
)	
vs.)	
)	
Square Inc.; William Tye Grisel;)	REPORT AND
Joe Grisel; G5 Marketing)	RECOMMENDATION
Solutions LLC; and John Doe)	
Bank,)	
)	
Defendants.)	
)	

This matter comes before the court on the motion of Square, Inc. (“Square”), to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons that follow, the undersigned recommends the district judge dismiss the motion to dismiss without prejudice.

Plaintiff filed this action on March 19, 2018 [ECF No. 1] and filed an amended complaint on May 29, 2018 [ECF No. 18]. Although a scheduling order had not yet issued, Plaintiff served discovery requests on Square on August 2, 2018. [ECF No. 55-1]. On August 9, 2018, Square filed this motion to dismiss Plaintiff’s amended complaint for failure to state a claim. [ECF No. 42]. Square also advised Plaintiff that its discovery requests were premature. [ECF No. 66 at 2].

On September 25, 2018, Plaintiff filed a motion for entry of scheduling order and/or to allow commencement of discovery, requesting it be allowed

discovery before the court ruled on Square's motion to dismiss. [ECF No. 55]. On October 16, 2018, the undersigned granted Plaintiff's motion "to the extent it request[ed] authorization to conduct discovery related to the resolution of Square's motion to dismiss" and extended the parties' deadline for filing supplemental memoranda to the motion to dismiss. [ECF No. 64].

On October 30, 2018, Square filed a motion objecting to the undersigned's October 16, 2018 order and requesting discovery be stayed. [ECF No. 66]. That motion is pending before the district judge.

Because any recommendation on the motion to dismiss relates to the district judge's ruling on Square's objections—i.e., whether a ruling can be made before limited discovery is conducted and what the discovery reveals if allowed—the motion is not properly before the undersigned at this time. Therefore, the undersigned recommends the motion be dismissed without prejudice to refile after the district judge determines whether limited discovery will be permitted prior to a ruling on the motion to dismiss. The undersigned further recommends that if the district judge permits limited discovery, Square be permitted to refile the motion after the discovery is completed. If the district judge does not permit discovery, the undersigned recommends Square be permitted to refile the motion to dismiss immediately upon the district judge's order.

IT IS SO RECOMMENDED.



November 27, 2018
Columbia, South Carolina

Shiva V. Hodges
United States Magistrate Judge

**The parties are directed to note the important information in the attached
“Notice of Right to File Objections to Report and Recommendation.”**

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).